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THE CASE OF THE CHECKER-BOARD ORDINANCE: AN EXPERIMENT IN RACE RELATIONS

By

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Jones & Smith v. *Town of New Harmony*

United States Court of Appeals, Special Circuit.
September 1, 1965.

Before ADAMS, BAKER, CARSON, DANIEL, and EVERETT, Circuit Judges.

ADAMS, Circuit Judge.

IN 1963, the Town of New Harmony, Illinois, adopted a so-called "checker-board ordinance," under which every residential building lot within its corporate limits was classified as either "N" or "W" pursuant to a plan permitting "N" property to be acquired and occupied only by Negroes and "W" property only by white persons. To classify the plot at the extreme north-east corner of New Harmony's corporate limits, the mayor flipped a coin at a public ceremony; with this as a base point, all other residential plots were thereupon designated, alternately, as "N" or "W". Public, commercial, industrial, recreational, institutional, and other nonresidential properties are not affected; but the residential areas of New Harmony are so laid out that the ordinance has produced in classification, and perhaps eventually would produce in practice, the "checker-board" from which it derived its popular name. New Harmony has no areas zoned for apartment houses or other multi-family dwellings, but the ordinance provides that should any be subsequently permitted, the apartments shall be alternately designated as "N" and "W". The ordinance accommodates persons who are neither Negro nor white by providing that, upon settling in New Harmony for the first time, such a person may acquire or occupy property regardless of designation, but thereafter he may not acquire or occupy property in the other category; and similar provision is made for parties to mixed marriages. Servants are not subject to the occupancy rules, but may live with the families for whom they work. Subterfuges to avoid the ordinance's restrictions, such as the acquisition of land through dummies and corporations, are forbidden. An administrative agency is vested with the power to waive any restriction on acquisition or occupancy in a case of extreme hardship.

The ordinance makes any lease, contract for the sale of land, or other agreement invalid if its performance would produce a violation of these rules governing the acquisition and occupancy of land, and the town clerk is forbidden to accept for recordation any conveyance or lease that is not accompanied by proof that the buyer or tenant may lawfully acquire or occupy the land in question. In addition, the corporation counsel of New Harmony is authorized to act, by injunction or other appropriate legal proceeding, in the event the ordinance is violated by any person.

Appellee Jones, a White, contracted to sell an unimproved building lot designated as "W" to Smith, a Negro, and, on the date set for closing the transaction, he tendered a deed in the usual form to Smith upon being paid the agreed price. The town clerk of New Harmony refused to record the deed, however, for the sole reason that Smith is a Negro; and the corporation counsel subsequently advised Jones that the town will continue to treat him as the owner of the property for all purposes. Jones and Smith thereupon sued New Harmony, in the appropriate federal district court, for a declaratory judgement that the ordinance is unconstitutional under the due process and equal protection clauses of the fourteenth amendment because it prevents Jones from selling, and Smith from buying, the lot in question solely because Smith is a Negro. The district court gave judgment for the plaintiffs, Jones and Smith, with a one sentence opinion citing the racial zoning, restrictive covenant, and school segregation cases, *Buchanan* v. *Warley,* 245 U.S. 60 (1917), *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), and *Brown* v. *Board of Education,* 347 U.S. 483 (1954); and the town of New Harmony took this appeal.

The record consists solely of the complaint filed by Jones and Smith, the defendant town's motion to dismiss, and the district court's order denying the motion to dismiss and holding the ordinance unconstitutional; but the parties have stipulated that we may consider, if relevant, these facts:

1. New Harmony is located on the outskirts of the Chicago metropolitan area. It became an incorporated town in 1962, when a group of public-spirited persons, Negro and white, purchased a large tract of undeveloped farm land in the hope of creating a model "integrated" community and arranged to meet the state's requirements for municipal incorporation.

2. The ordinance under attack was enacted by New Harmony's City Council after its Housing Committee heard testimony from several students of American race relations to the effect that private discrimination and prejudice are heightened by segregated housing patterns and lowered by integrated patterns; that a community with a stable pattern of integrated housing would enrich the lives of all its citizens by enlarging their relations with persons of another race; that the semi-rural amenities of New Harmony would attract as many persons from the Chicago area as the town could accommodate; but that Whites either would not move to New Harmony or would tend to leave if they thought they would come to be greatly outnumbered by Negroes. There was agreement among these experts that legal restrictions on the occupancy of residences in New Harmony would be necessary to the suc-

cess of a stable integrated community. Although their attention was focussed on occupancy, they recommended that the acquisition of property be similarly restricted, on the theory that if land could be purchased (*e.g.*, for rental to others) without regard to the purchaser's race, the town might later find it difficult to resist pressure from the owner for an exception to the master plan allowing him to occupy his own property.

3. In its report to the City Council, the Housing Committee accepted the validity of these views and recommended enactment of the "checker-board ordinance" as the legal device most likely to achieve and preserve a pattern of integrated housing in New Harmony. All persons who then owned land in New Harmony (primarily the group that had purchased the area in 1962) joined in a petition to the City Council endorsing the recommendation of the Housing Committee.

4. The ordinance, with minor changes not here relevant, was enacted by the City Council, and the mayor proceeded to classify every residential building lot in the manner described earlier. In the two years since then, many houses have been built in New Harmony, and all property, whether improved or not, is now owned and occupied in compliance with the ordinance, except for the plot that is the subject of this lawsuit.

The parties are in agreement that the only question to be decided by us is whether the ordinance violates the equal protection or due process clauses of the fourteenth amendment to the United States Constitution.[1] They also agree that several cases passing on the validity of racial quotas employed by public housing agencies in the selection of tenants are not controlling.[2]

In the opinion of a majority of the court, the Supreme Court decisions cited by the district judge in giving judgment for the plaintiffs are as conclusive as he found them to be.

In *Buchanan* v. *Warley, supra,* the Supreme Court held that an ordinance enacted in Louisville, Kentucky, forbidding Negroes to move into or occupy

1. In their brief, the plaintiffs refer in passing to 42 U.S.C. § 1982 (providing that all citizens shall have the same right in every State to inherit, purchase, lease, sell, hold, and convey real property as is enjoyed by white citizens), but they follow the lead of the Supreme Court in *Shelley v. Kraemer* in resting their case on the fourteenth amendment, possibly because § 1982 does not explicitly guarantee equal rights in the *use and occupancy* of real property.

No claim is made under the Illinois constitution, evidently because a 1963 test case between the Secretary of State and the town of New Harmony held that the ordinance was a proper exercise of the power granted to the town by its charter.

2. In Banks v. Housing Authority of San Francisco, 260 P.2d 668 (Cal. 1953), *cert. denied,* 347 U.S. 974 (1954), a public housing authority's policy of providing low rent apartments in proportion to the number of families of each racial group potentially eligible for admission was held to violate the fourteenth amendment; see also Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (1954) (quota invalid); Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941) (quota valid). Neither *Banks* nor *Taylor* was concerned with an affirmative effort to achieve integration, and the *Favors* case, decided long before *Brown v. Board of Education,* relied on *Plessy v. Ferguson* in finding that the housing authority had provided equal treatment to both races.

houses in residential blocks that were predominantly occupied by white persons, and imposing reciprocal restrictions on white persons, was unconstitutional as violating the due process clause of the fourteenth amendment:

> It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.
>
> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.
>
> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.
>
> It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.
>
> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand. [245 U.S. at 81-82]

The principle of *Buchanan* v. *Warley* was later employed, in per curiam opinions, to strike down a New Orleans ordinance forbidding a Negro to occupy a residence in a "white community" without the written consent of a majority of the Whites therein (and vice versa), and an ordinance of Richmond, Virginia, prohibiting anyone from occupying a residence in an area in which the majority of residences were occupied by persons with whom he was forbidden to intermarry by Virginia's antimiscegenation statute. *Harmon* v. *Tyler,* 273 U.S. 668 (1927); *Richmond* v. *Deans,* 281 U.S. 704 (1930).

In *Shelley* v. *Kraemer, supra,* the Supreme Court held that the enforcement by a state court of a racial restrictive covenant, voluntarily adopted by private parties, was "state action" that could not be distinguished, for constitutional purposes, from the racial zoning ordinance that had been held unconstitutional in *Buchanan* v. *Warley.* Although *Buchanan* was decided under the due process clause (on the ground that the rights of a white seller had been unconstitutionally restricted), in *Shelley* the Supreme Court rested its decision on the equal protection clause, stating that "such legislation [the ordinance in *Buchanan*] is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color . . . ." 334 U.S. at 12.

To the argument that equal protection of the laws would not be impaired by judicial enforcement of a restrictive covenant against Negro occupancy so long as the courts stood ready to enforce covenants prohibiting white occupancy of other property, the Supreme Court said in *Shelley:* "The rights established [by the fourteenth amendment] are personal rights .... Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22.

I conclude that *Buchanan* v. *Warley* and *Shelley* v. *Kraemer* establish an absolute prohibition on the use of race or color as a criterion of state action, at least in the area of land tenure and occupancy.

My conclusion is reinforced by *Brown* v. *Board of Education, supra,* holding that state laws requiring or permitting racial segregation of public school pupils violate the equal protection clause. To be sure, the Court there expressed the opinion that the separation of Negro school children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," 347 U.S. at 494, thus implying that the validity of legislation using race or color as a criterion of individual rights depends upon whether it generates a feeling of inferiority in one (or, conceivably, both) of the separated groups. But if the Court intended to allow the constitutional propriety of racial separation in the public schools to turn on its actual or probable results in each time and place, or on the outcome of fragmentary and inconclusive experiments of the type referred to by the Court in a footnote, the opinion would surely have been written in far less sweeping terms. Moreover, in referring to the adverse effects of racial discrimination in the assignment of school children, the Court did not distinguish, or even mention, other criteria commonly used in assigning children to separate schools (*e.g.,* age, sex, educational achievement, vocational aims, geographical location, etc.), any of which may be felt by children to stamp them and their schools as inferior.[3] Since I cannot believe that the Court intended to outlaw by inference these criteria for assigning pupils to schools or classrooms, I conclude that *Brown* v. *Board of Education* decided that race is an improper criterion for the assignment of school children, regardless of the consequences of such a classification. This conclusion is supported by the Supreme Court's later decisions outlawing racial segregation in public parks, buses, and golf courses in per curiam opinions that cited the *Brown* case without suggesting that adverse consequences would be generated by discrimination in these other public facilities. *Muir* v. *Louisville Park Theatrical Ass'n,* 347 U.S. 971 (1954); *Mayor* v. *Dawson,* 350 U.S. 877 (1955); *Holmes* v. *Atlanta,* 350 U.S. 879 (1955); *Gayle* v. *Browder,* 352 U.S. 903 (1956); *New Orleans City Park Improvement Ass'n* v. *Detiege,*

3. These criteria cannot be conclusively distinguished from race or color on the ground that they bear a necessary relationship to the legitimate educational aims of the public school system, since these educational aims could be advanced with less damage to the child's pride by using separate classes or other devices short of separate schools. *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940).

358 U.S. 54 (1958). In short, I construe *Brown* as endorsing Mr. Justice Harlan's famous statement that the "Constitution is color-blind."[4]

I cannot accept New Harmony's theory that its "checker-board ordinance" is to be distinguished from the zoning ordinance in *Buchanan* v. *Warley*, from the enforcement of the restrictive covenant in *Shelley* v. *Kraemer*, and from the system of school segregation in *Brown* v. *Board of Education* on the ground that they were designed to, and did, separate the races, while the "checker-board ordinance" serves the cause of integration. The announced purpose of the Louisville zoning ordinance was "to prevent conflict and ill-feeling between the white and colored races," 245 U.S. at 70, an aim which, if not identical with New Harmony's announced purpose, is at least consistent with it and no less worthy. Publicly announced purposes, to be sure, may be exercises in deception, or even in self-deception, but I have no tools for probing below the surface of either Louisville's or New Harmony's announced purpose; and our courts, whether from fear or humility, have traditionally refused to inquire into the motives of legislators.[5] And if we are to confine our inquiry to the results of the state's action, I am not equipped as a judge to decide whether New Harmony's ordinance will contribute more than Louisville's zoning scheme to racial amity or whether either would be more efficacious than complete freedom of movement—and I would not know whether to compare their results, even if I had the tools to predict them, on a short-run or long-run basis, on a local or national scale, or in terms of outward behavior or inward attitude. The one fixed star that I can make out in this area is that the Supreme Court did not hesitate in *Shelley* v. *Kraemer* to prohibit judicial enforcement of a covenant that may have been, and probably was, the principal reason why an area that had enjoyed mixed Negro and white occupancy for a generation had not become a Negro ghetto.[6] And in doing so, the Court used language that admits of no distinction between high-minded and low-minded covenantors.

I conclude, therefore, that the district court's judgment, holding New Harmony's ordinance to be unconstitutional, was correct and should be affirmed.

Judges BAKER and CARSON concur; Judge DANIEL concurs in an opinion to be filed at a later time.

4. 163 U.S. 537, 559 (1896). See also the formulation in Strauder v. West Virginia, 100 U.S. 303, 307 (1879): ". . . the law in the States shall be the same for the black as for the white . . . ."

5. If the validity of the State's action is to depend upon motive, whose would be controlling in *Shelley v. Kraemer:* the persons who originally entered into the covenant, the persons who asked for judicial enforcement, or the court itself?

6. The covenant in *Shelley v. Kraemer* was signed in 1911 by thirty landowners; four white and five Negro non-signers lived in the same district. When the action was begun 35 years later, four of the latter premises were occupied by Negroes, and had been so occupied for periods ranging from 23 to 63 years. A fifth parcel had been occupied by Negroes until a year before the action was begun. Record, pp. 2-3, Shelley v. Kraemer, 334 U.S. 1 (1948). See also Hurd v. Hodge, 334 U.S. 24 (1948), holding that a restrictive covenant applicable to a block of long-standing mixed occupancy in the District of Columbia could not be judicially enforced.

EVERETT, Circuit Judge (dissenting)

The fourteenth amendment is almost one hundred years old, and its life has been replete with irony: railroads, utility companies, banks, employers of child labor, chain stores, money lenders, aliens, and a host of other groups and institutions have all found nurture in the due process and equal protection clauses,[1] leaving so little room for the Negro that he seemed to be the fourteenth amendment's forgotten man. This despite the Supreme Court's early recognition that "the one pervading purpose" of the thirteenth, fourteenth, and fifteenth amendments was to insure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 71 (1872). Indeed, so clear was it, in those days when the Civil War was still a fresh memory, that the Negro was the object of the fourteenth amendment's solicitude that the Supreme Court said of section 5 (authorizing Congress to enact appropriate legislation to enforce the amendment): "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." 83 U.S. at 81. The kaleidoscope of life often refuses to reflect our confident predictions, but seldom has a forecast been so completely lost to sight. Even so, the crowning irony comes today, when the racial zoning, restrictive covenant and school segregation cases, which had begun to restore the fourteenth amendment to the Negro, are used as weapons to destroy the first local legislation to ameliorate the condition of the Negro that has passed in review before this court.

I

Although the majority's use of *Buchanan v. Warley,* 245 U.S. 60 (1917), *Shelley v. Kraemer,* 334 U.S. 1 (1948), and *Brown v. Board of Education,* 347 U.S. 483 (1954) to invalidate New Harmony's ordinance may be superficially appealing, a more careful examination shows that reliance on these cases is an exercise in mechanical jurisprudence.[2] The announced purpose of the municipal zoning ordinance in *Buchanan v. Warley, supra,* was to require "as far as practicable, the use of separate blocks for residences, places of abode and places of assembly" by Negroes and Whites, 245 U.S. at 70, in order to achieve, as the Kentucky Court of Appeals put it, the "enforced separation of

1. See FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT, Appendix I (*Cases Holding State Action Invalid Under the Fourteenth Amendment*) (1938).

2. The process was acidly described by Justice Cardozo:
> Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

the races". 165 Ky. 559 at 570, 177 S.W. 472, at 476 (1915). Whether this was done "to prevent conflict and ill-feeling" between the races, as the ordinance recited, 245 U.S. at 70, or for less worthy objectives, separation (or segregation, to use a blunter but no less accurate term) was both the purpose and the effect of the ordinance.

Whatever view may be taken of the basis and scope of *Buchanan*, its holding cannot be fairly applied to the New Harmony ordinance. To the extent that *Buchanan* held that the Louisville ordinance was invalid as an undue restriction on a landowner's right to dispose of his property,[3] it necessarily rests upon a determination that the police power of the state does not include a power to require "the compulsory separation of the races on account of color." But this sheds no light on whether the state's police power may be employed to achieve integration in housing. If *Buchanan* is viewed more broadly as invalidating all "state legislation discriminating against [the Negro] solely because of color" (245 U.S. at 79), it does not tell us when legislation "discriminates against" a racial group. Any legislation that treats individuals (minors, women, men of draft age, veterans, lawyers, Indians, etc.) as members of a class necessarily distinguishes them from others; but the legislation does not "discriminate" (in an invidious sense) if the classification is validated by some appropriate purpose or effect.

The New Harmony ordinance imposes inconveniences on some landowners and their prospective customers or tenants; the issue before us is not the existence of these restrictions, but their constitutional propriety. *Buchanan* invalidated legislation requiring Negroes and Whites to live apart; but it does not follow ineluctably that legislation requiring them to live together is equally invalid, any more than a holding that the state may not inject its citizens with disease germs would imply that compulsory vaccination is equally bad. The Louisville and New Harmony ordinances are different in purpose and effect; while I do not suggest that the invalidity of the former leads automatically to the validity of the latter, this seems to me a better working hypothesis than the majority's insistence that the invalidity of the one proves the invalidity of its opposite. The Constitution may be color-blind, but it is not short-sighted.

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3. In finding that the Louisville ordinance was an unconstitutional "interference with property rights" because it limited the landowner's right to dispose of his property, *Buchanan* strikes an antiquated note, while the opinion of the Kentucky Court of Appeals, upholding the ordinance, is more harmonious with the contemporary judicial view of freedom of contract:

> The *jus disponendi* has but little place in modern jurisprudence. The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the State in respect thereof, so that today all private property is held subject to the unchallenged right and power of the State to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare.

165 Ky. at 569, 177 S.W. at 476 (1915).

Shelley v. Kraemer leads no more compellingly to the result reached by the District Court than does *Buchanan v. Warley*. In *Shelley*, the Supreme Court held that a state court's action in enforcing a private racial restrictive covenant violated the fourteenth amendment, even though "the particular pattern of discrimination . . . was devised initially by the terms of a private agreement," 334 U.S. at 20, because the state "made available to [the private individuals who sought to enforce the agreement] the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." 334 U.S. at 19. *Shelley* is even less pertinent than *Buchanan v. Warley* to the validity of the New Harmony ordinance, since *Shelley* was concerned entirely with state action to enforce, through its judiciary (and, potentially, its executive officers), an *ad hoc*, private agreement totally divorced from any public plan for the regulation of race relations. It has been suggested that the Supreme Court's action in *Shelley* may have unsettled a neighborhood of mixed racial occupancy, and from this is drawn the inference that the Court has set its face resolutely against any public plan to achieve integration. Perhaps *Shelley* forbids judicial enforcement of private convenants designed in good faith to "stabilize" neighborhoods of mixed racial occupancy,[4] although it was not argued that the convenants there before the Court had this purpose or effect, and it is appropriate here to recall what Justice Sutherland said in *Webster v. Fall*, 266 U.S. 507, 511 (1925):

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

It may even be—though I am far from clear on the point—that *Shelley* forbids the judiciary to enforce private restrictive covenants even if they are executed in conformity with a public master plan for integration of an entire community; at least, it is arguable that such an arrangement would improperly transfer the invocation of governmental power to private hands. But I reject totally the argument that *Shelley* condemns the New Harmony ordinance, which gives no public sanction or support whatsoever to private prejudice.[5]

4. Where such devices are not in pursuance of a public plan, but are put into effect by the *ad hoc* decisions of private persons, they (unlike the New Harmony ordinance) will almost inevitably fail to provide a comprehensive system of adequate alternatives for those whom they exclude on racial grounds. The opinion of the district court in Progress Development Corp. v. Mitchell, 182 F. Supp. 681 (N.D. Ill. 1960), *rev'd in part and remanded*, 286 F.2d 222 (7th Cir. 1961), which found a private real estate developer's plan to impose a "benign" quota to be objectionable, might have been implicitly based on this theory. See also Hughes v. Superior Court, 339 U.S. 460 (1950), upholding a state court injunction against picketing to compel a private employer to hire personnel in proportion to the racial origin of its customers.

5. The line of forbidden conduct marked by the Equal Protection Clause of the Fourteenth Amendment is crossed only when a State makes prejudice or intolerance its policy and enforces it....

Garner v. Louisiana, 368 U.S. 157, 178 (1961) (Douglas, J., concurring).

The school segregation case, *Brown v. Board of Education,* is also misapplied by the majority when it is employed to invalidate New Harmony's ordinance. In holding that a state cannot segregate pupils in the public school system by race, the Supreme Court did not explicitly or by implication suggest that the state can take no action to foster integrated housing or even integrated schooling. The relevant part of the *Brown* case, for present purposes, is its recognition of the psychological wounds inflicted by racial segregation; just as these evils led the Supreme Court to invalidate school segregation laws, so they have led New Harmony to enact its "checker-board ordinance." Hence, the *Brown* case and New Harmony's ordinance may be properly viewed as parallel therapeutic measures directed against a similar evil.[6] I cannot accept the theory that New Harmony, in seeking to destroy segregation in residential housing, has violated the same Constitutional provision that was violated by state laws *requiring* segregation in public education. The principle that a classification may be proper for one purpose but improper for another seems so reasonable—indeed, so indispensable to any system of law—that one wonders at finding it challenged. Men who did not serve in the armed forces were denied the benefits of the "G.I. Bill of Rights": does this mean that they could have been required to wear yellow arm bands? The indigent receive relief benefits from the government: may their children therefore be required to sit at the rear of the class in public schools?

Once we recognize that the case now before us was not decided, explicitly or by necessary implication, by *Buchanan v. Warley, Shelley v. Kraemer,* or *Brown v. Board of Education,* we are free to examine the issues it presents on the merits.

II

Setting aside for a moment the plaintiffs' equal protection argument, and confining our attention to their due process objection to New Harmony's ordinance,[7] the question before us reduces itself to this: Is the regulation

6. I say "similar" rather than identical, since the *Brown* case frustrated official segregation, while the New Harmony ordinance seeks to destroy unofficial segregation; this distinction is undoubtedly important in some contexts, but it does not invalidate my argument that the district court overlooked a kinship between *Brown v. Board of Education* and New Harmony's ordinance and erred in regarding them as in opposition. In fact, although the issue in *Brown* was the constitutional validity of official segregation, the Court there quoted with approval from a lower court opinion which spoke of the detrimental consequences of segregated education even when not imposed by law: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law . . . ." Brown v. Board of Education, 347 U.S. 483, 494 (1954). Moreover, many of the deficiencies that led the Supreme Court to hold that a separate Negro law school was not equal to the white law school at the University of Texas, Sweatt v. Painter, 339 U.S. 629 (1950), are also to be found in schools that are all-Negro as a consequence of residential concentration rather than official segregation.

7. It is not easy to separate the equal protection objection from the due process objection, especially since the Supreme Court decided *Brown v. Board of Education* under the equal protection clause but on the same day held school segregation in the District of Columbia

"reasonable in relation to its subject and . . . adopted in the interests of the community"? *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 391 (1937). If so, it is a valid exercise of the state's police power, and the restrictions it imposes on the plaintiffs do not "deprive" them "of life, liberty, or property, without due process of law." It is common knowledge that throughout our nation most urban Negroes live in well-defined geographical areas, and that they can escape from these *de facto* ghettoes, if at all, only by unremitting persistence in the face of hostility and deception by property owners, real estate brokers, financial institutions, and neighborhood associations. The informed students of American race relations who appeared before New Harmony's Housing Committee attributed many evil conditions to this concentration of Negro housing and argued that its dispersion will serve to ameliorate these conditions. They also asserted that such a dispersion of Negroes would serve to combat widely-accepted racial misconceptions that are a barrier to equal opportunities in education, employment, public life, and other aspects of our society.[8] When these observers turned their attention from the Negro to the White, they asserted that *de facto* segregation does such harm to the dominant race that Whites are its victims as well as Negroes, in what has been called "this fated mutuality that inheres in all inflicted wrong" by Black, *The Lawfulness of the Segregation Decisions,* 69 Yale L.J. 421, 428 (1960). New Harmony's ordinance, it is argued, will disabuse its white citizens of their misconceptions of the Negro, and thus improve their ability to come to terms with the world they live in.

Perhaps both the diagnosis and the remedy proffered by these students of American race relations are too facile, but it is not our function to decide whether this be so or not. It is enough that we cannot say that New Harmony's City Council acted arbitrarily when it launched its experiment in "normalizing" Negro housing. As the Supreme Court, per Mr. Justice Frankfurter, said in *Beauharnais v. Illinois,* 343 U.S. 250, at 262 (1952):

> Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not un-

unconstitutional under the due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954). Despite this, the plaintiffs have invoked the two constitutional clauses separately, and I have followed the organization of their brief.

8. The Supreme Court has had occasion recently to refer to the opinion of many observers that the individual in our society is "inextricably involved" with the status of groups to which he belongs, especially if his affiliation is unavoidable rather than voluntary:

> It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.

Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

> related to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."

So far as due process is concerned, I do not find that New Harmony's ordinance differs in any vital respect from other social legislation that has been upheld by the Supreme Court in the recent past. Consider, for example, what was said in *West Coast Hotel Co. v. Parrish* in upholding Washington's Minimum Wages for Women Act:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. 300 U.S. at 391 (1936).

Or what was said in *Berman v. Parker,* 348 U.S. 26 (1954), in sustaining the constitutionality of the District of Columbia Redevelopment Act of 1945:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river . . . .
>
> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. 348 U.S. at 32-33.

Indeed, the Supreme Court's remarks in *Muller v. Oregon,* 208 U.S. 412 (1908), upholding an Oregon statute prohibiting the employment of women

in laundries in excess of ten hours per day, might be applied to Negroes with only minor emendations.

> [Man] established his control [over woman] at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present . . . . Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. 208 U.S. at 421-22.

New Harmony's ordinance does, of course, restrict the right of an owner to sell his property to whomever he chooses, but we have long since acknowledged that this right is subject to many limitations. The landowner's economic interest is no more sacrosanct than the business man's; and I see no warrant for applying a different standard of constitutionality than was applied to the economic regulation of retail milk prices by *Nebbia v. New York,* 291 U.S. 502 (1934):

> These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need . . . .
>
> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* 291 U.S. at 524-25, 537.

It is, of course, not only the landowner who relies on the due process clause. The would-be purchaser wants to live where he chooses, and argues that he is being deprived of this "liberty" without "due process of law." But this argument either coincides with his equal protection argument, which I will discuss shortly, or it is no more valid than the landowner's reliance on due process. For we have no longer, if we ever had, an unrestricted right to live where we choose: one cannot live even on his own property if it is zoned for commercial or industrial purposes; one cannot live in a tent if the building code requires a fireproof roof; one cannot live with a friend if his home is restricted to single-family occupancy. To be sure, freedom of movement within the country is embraced within the "liberty" protected by the fifth and fourteenth

amendments; and I can agree with the abstract proposition that if one cannot come to rest, his movement is restrained. Nor would I disagree, again on a high level of abstraction, with the assertion that if one is officially excluded from enough places, the space that is left may be properly labelled a concentration camp. But these assertions merely lay the foundation for judicial review by showing that we are confronted with a real, not a frivolous, claim; they fall far short of proving that the claim should be honored. In essence, the would-be purchaser complains that he is not allowed to acquire and occupy every house in New Harmony, but only every other one. But this restriction on his freedom to live where he wishes, taken alone, is too mild to permit us to say that New Harmony is guilty of unreasonable and arbitrary action in determining that the values served by imposing this restriction outweigh those that are denied by it.

In alleging that he has been deprived of liberty without due process of law by the ordinance, the would-be purchaser also invokes "freedom of association." He points out that if he wants Negro neighbors, he cannot have them next door, but only next door once removed, and that he must live next to a white family even if this is distasteful to him. Of greater moment than the denial of these idiosyncratic preferences is the fact that he cannot live in a Negro "neighborhood," at least not in New Harmony, even though he may think that will foster a cultural tradition, reduce social abrasions, and protect his children from the temptations of mixed marriages. He complains that we profess cultural pluralism, but destroy the group life that is its prerequisite, and he argues that the erosion of folkways by contemporary modes of communication and other institutions is so rapid that our national life is in danger of losing its savor.

I am not disposed to dispute this prediction. America is a melting pot, and homogeneity seems to be our destiny. At any rate, freedom of association is already denied in our public life: the Constitution itself prevents us from selecting our associates when we serve in Congress, on a jury, in the armed forces, or in a government bureau; and we are frequently compelled by federal, state, and local legislation to put up with unwelcome associates if we ride on a railroad, stay in a hotel, eat in a restaurant, work for a private employer, or join a labor union.[9] Of course, the plaintiff does not ask that he be allowed to select his associates in those walks of life where this freedom could be secured only by denying to others the freedom to serve on juries, work for the government, live in public housing projects, or attend the public schools nearest their homes. But he argues that as to private housing, the government has no affirmative duty to insure freedom of access; and in this area, he asserts that he should be allowed to choose his own associates. This claim to free-

9. See generally, MURRAY, STATES' LAWS ON RACE AND COLOR (1950 and 1955 Supp.); Note, 74 HARV. L. REV. 526 (1961); statutes cited in Morgan v. Virginia, 328 U.S. 373, 382 n. 24 (1946). See also Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); City of Highland Park v. Fair Employment Practices Comm'n, 364 Mich. 508, 111 N.W. 2d 797 (1961); note 11 *infra*.

dom of association cannot be reconciled with legislation barring racial discrimination by labor unions and employers, since decisions upholding the constitutional validity of such legislation [10] necessarily held that freedom of association is only one of the values to be weighed by the legislature, and that within limits it may be subordinated to other values. If freedom of association can be denied in these areas in the interest of enlarging the opportunities of members of minority groups, it can be as properly denied in the area of land tenure and occupancy.[11]

In passing on the validity of New Harmony's ordinance, we not only must defer in large measure to the legislative balancing of public values, but also must weigh the fact that the ordinance seeks to remedy evils stemming in part from unconstitutional behavior by government in times past. I refer, of course, to federal, state, and local laws and practices discriminating against Negroes in the administration of public school systems, government employment, public housing, and the armed forces. Some, indeed, have argued that private race prejudice is so much the heritage of past unlawful official action that some private acts of discrimination, at least in our day and age, violate the fourteenth amendment. They view the restauranteur, employer, or landlord who refuses to deal with a Negro as a kind of brain-washed automaton for whose conduct the state, which set him in motion, must remain responsible until he can be said to have regained the power to think independently.[12] It is not necessary to go this far, however, to reach the conclusion that official complicity in racial discrimination in past years enlarges the public interest in official corrective measures today. Even though no part of today's private prejudice may be ascribed to the past official acts of New Harmony, that community is not acting the busybody in attempting to alter a social pattern that was in large part shaped by affirmative, and often formal, governmental action.[13]

10. Railway Mail Ass'n v. Corsi, *supra* note 9.

11. Surely land tenure and occupancy are no more matters of exclusively "private" concern than employment. For legislation prohibiting racial discrimination not only in "publicly-assisted" housing, but in all multifamily units, see U.S. CIVIL RIGHTS COMMISSION, 1961 REPORT ON HOUSING Appendix VI, Table 1 (198-99); McGhee and Ginger, *The House I Live In, A Study of Housing For Minorities,* 46 CORNELL L. Q. 194, 216-38 (1961).

12. It was recognized as early as the Civil Rights Cases, 109 U.S. 3 (1883), that § 5 of the fourteenth amendment authorizes Congress "[t]o adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." *Id.* at 11. It would seem at least consistent with this view of § 5, if not to follow *a fortiori* from it, that without waiting for Congress to act, a state may itself take appropriate action to correct the lingering effects of any unlawful discrimination it may have practiced in the past, and it is not really a giant step from this to state legislation counteracting the local fallout produced by unlawful state action in other parts of the country.

13. In Hirabayashi v. United States, 320 U.S. 81 (1943), the Supreme Court upheld a war-time curfew on persons of Japanese ancestry, in part because earlier legal restrictions imposed on such persons (with respect to immigration, naturalization, land tenure, etc.) may have diminished their loyalty to the United States—so that old legal disabilities became the foundation for new ones. We are concerned here, to the contrary, with a present attempt to *correct* past injustices—an effort with which it is hard not to sympathize.

III

I turn now from the due process arguments advanced by both plaintiffs to the equal protection argument made by Smith, the Negro plaintiff, who is prevented by New Harmony's ordinance from purchasing and occupying a plot designated as "W". I have already set out my reasons for believing that this issue is not foreclosed, as the majority asserts, by *Buchanan v. Warley, Shelley v. Kraemer,* or *Brown v. Board of Education.* Moreover, I can find nothing in the history of the equal protection clause to support the claim that is here founded on it. Assuredly the clause guaranteed that Negroes might inherit, hold, and dispose of land—legal powers that had hitherto been widely denied to them—as freely as Whites, but New Harmony's ordinance does not, in my opinion, deny equality before the law in the purchase and occupancy of land.

To be sure, in *Shelley v. Kraemer,* the Supreme Court held that the equal protection clause forbade a state court to enforce a restrictive covenant excluding Negroes even though the same state court stood willing to enforce a hypothetical covenant excluding Whites from other property. In rejecting this attempt to adapt the "separate but equal" principle to land tenure and occupancy, the Court said that the equal protection clause created "personal rights" and that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22. But one need know only a little about the economic status of Negroes in our country in 1948, when *Shelley v. Kraemer* was decided, to see that the argumentative attempt to equate covenants excluding Negroes with a hypothetical covenant excluding whites was hardly more than a cruel joke, like "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." In speaking of "indiscriminate imposition of inequalities" the Court referred to our society, not to Utopia; and in saying that the rights established by the fourteenth amendment are "personal rights," the Court was using a shorthand expression, not forging a tool for the analysis of all legal problems in race relations that may arise in the indefinite future. Thus, the fact that the right to acquire and hold land was secured to the Negro by the equal protection clause does not dispose of the case before us, where (unlike *Shelley v. Kraemer*) there is no inequality in the amount or character of the land available for purchase by Negroes and Whites respectively.

It is argued that the equal protection clause as drafted and ratified was understood to outlaw *all* distinctions based on race, so that it is violated by local legislation forbidding a Negro to acquire or occupy land that can be freely acquired or occupied by a white person. But no such unequivocal rejection of racial distinctions can be found in the "original understanding" of the equal protection clause. Indeed, it was not even understood to guarantee to Negroes the right to vote; that assurance came only with the fifteenth amendment. And in *Brown v. Board of Education,* though recognizing that the "most avid proponents" of the Civil War amendments "undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States,' " the Supreme Court could not say that this view was broadly

shared; and it was forced to conclude that the fourteenth amendment's history was "inconclusive" with respect to segregation in public schools. The "original understanding" may have tolerated other racial distinctions as well, such as antimiscegenation laws and the exclusion of Negroes from juries.[14] Thaddeus Stevens, at any rate, having hoped from youth to old age to see the day when "no distinction would be tolerated in this purified Republic but what arose from merit and conduct," said of section 1 of the fourteenth amendment that it merely patched up "the worst portions of the ancient edifice, . . . leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism."[15]

Even if the equal protection clause had been understood as accomplishing all that its "most avid proponents" had wished, it would still have been a response to the practical issue then before the country: the extent to which the Negro should be protected by the Constitution and Congress from hostile state and local legislation. This was recognized by the Supreme Court when the legislative battles that can today be followed only by resuscitating old newspapers were still fresh memories, and it led the Court to say in 1879 that the fourteenth amendment conferred on Negroes:

> [T]he right to exemption from *unfriendly legislation* against them distinctively as colored—*exemption from legal discriminations, implying inferiority* in civil society . . . *and discriminations which are steps towards reducing them to the condition of a subject race. Strauder v. West Virginia.* 100 U.S. 303, 308 (1879). (Emphasis added.)

As to the validity of state and local legislation whose purpose was to achieve an integrated pattern of housing, the possibility of such legislation was so remote when the fourteenth amendment was adopted that we cannot even say that the question "was lurking in the record," let alone that it was authoritatively answered. The New Harmony ordinance may or may not be wise, but surely Negroes—or, for that matter, Whites—cannot properly indict is as "unfriendly legislation," as "legal discrimination implying inferiority," or as a step towards "reducing them to the condition of a subject race."

When I turn from the original understanding of the words making up the fourteenth amendment to "the line of their growth"[16] to see whether New Harmony's ordinance stands condemned by the equal protection clause as experience has led the courts to interpret it, I find that the Supreme Court has recently summarized the standards imposed by this clause on state and local

14. The most recent historian of the subject concluded that § 1 "as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation," and found no shift in this understanding while the amendment was being ratified. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955). Writing a few years earlier, Frank and Munro, in *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 145, 162 (1950), had "considerable doubt" about equality in jury service and were unable to reach an assured conclusion as to antimiscegenation statutes.

15. Bickel, *supra* note 14, at 55.

16. Justice Holmes, in Gompers v. United States, 233 U.S. 604, 610 (1914), quoted by Bickel, *supra* note 14, at 6.

legislation in language that is virtually identical with what it has said about the due process clause:

> Although no precise formula has been developed, the Court has held that [the equal protection clause of] the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961).

Racial segregation in the public schools, when tested by this standard, is unconstitutional because the classification "rests on grounds wholly irrelevant" to the achievement of the state's educational objectives and because the compulsory separation of the races cannot be defended as an independent alternative objective. This is why *Brown v. Board of Education* is not inconsistent with the Japanese curfew and exclusion cases, in which the Supreme Court upheld first a curfew on persons of Japanese ancestry and then their total exclusion from the West Coast during wartime. Because racial distinctions often—indeed, usually—stem from racial antagonism or hatred, they are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Even when they are merely irrelevant to any proper public purpose, they are prohibited. But given a proper purpose to which the racial classification is instrumental, the equal protection clause does not condemn it.

Viewed in this light, New Harmony's racial classification is readily seen to be appropriate to the achievement of a reasonable public objective—the reduction of racial discrimination and prejudice[17]—and it is consistent with other racial classifications that have been tolerated, or even generated, by the Supreme Court because they served legitimate governmental objectives. These precedents for New Harmony's ordinance include:

1. Legal restrictions on American Indians. The legal restrictions on American Indians, recognized and enforced by the federal judiciary, are so numerous as to defy cataloguing.[18] For present purposes, it is enough to note that many Indians are treated as wards of the United States and are forbidden to dispose of both tribal and individual property until certified as competent to handle their own affairs by the Secretary of the Interior. Even if this requirement were regarded as merely a procedural device for insuring that an Indian who wished to dispose of property was *compos mentis,* it would impute presumptive incompetence to a group of persons on the basis of blood.[19] In point of

17. When it was argued to the Supreme Court that a state did not have the constitutional authority to forbid racial discrimination by a labor union, the assertion was described in a concurring opinion as "devoid of constitutional substance," and the majority opinion was almost as summary. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

18. See generally, U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW (1958).

19. [E]xperience shows that generally speaking the greater percentage of Indian

fact, however, more is involved than such a procedural presumption, since the test of "competence" as applied to Indians is different from that applied to Whites. To obtain a certificate of competency, an Indian must show that he has "at least sufficient ability, knowledge, experience, and judgment to enable him to conduct the negotiations for the sale of his land and to care for, manage, invest, and dispose of its proceeds with such a reasonable degree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds." *United States v. Debell,* 227 Fed. 760, 770 (1915); see also Act of August 11, 1955, ch. 786, 69 Stat. 666, 25 U.S.C. section 355 (1958); *Squire v. Capoeman,* 351 U.S. 1, 6-7 (1956) (special status of Indians, with respect to competence, recognized after *Brown v. Board of Education*). As to a White, the absence of such business skill might warrant a court in removing him as a trustee of someone else's property, but it would hardly be enough to forfeit his right to dispose of his own property. A striking example of this disparity in the standards applicable to Indians and Whites is that Charles Curtis, although he became Vice President of the United States, was an "incompetent Indian" who could not dispose of certain property without the approval of the Secretary of the Interior.[20]

2. *Racial distinctions in attacks on exclusion from state jury service.* If Negroes are systematically excluded from jury service by a state court, the conviction of a Negro violates the fourteenth amendment, *Strauder v. West Virginia,* 100 U.S. 303 (1879), but this objection to the manner in which juries are chosen is entertained only if the defendant belongs to the excluded class. See *Hernandez v. Texas,* 347 U.S. 475 (1954); *Fay* v. *New York,* 332 U.S. 261 (1947); Scott, *The Supreme Court's Control Over State and Federal Criminal Juries,* 34 IOWA L. REV. 577, 590-94 (1949).[21] This distinction between white and Negro defendants can hardly rest on the white defendant's lack of "standing"—he surely has "such a personal stake in the outcome of the contro-

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blood a given allottee has, the less capable he is by natural qualification and experience to manage his property."

United States v. Shock, 187 Fed. 862, 870 (1911).

See also DOUGLAS, WE THE JUDGES 399 (1956):

> Experience shows that liquor has a devastating effect on the North American Indian and Eskimo. It is, therefore, commonly provided in the United States and Canada that no liquor should be sold to those races. Other regulations based on race may likewise be justified by reason of the special traits of those races, such, for example, as their susceptibility to particular diseases.

Mr. Justice Douglas goes on to point out that "what at first blush may seem to be an invidious discrimination may on analysis be found to have plausible grounds justifying it."

20. U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 553 (1958).

21. In Fay v. New York, 332 U.S. 261 (1947), the Supreme Court said that the practice of upsetting state convictions when Negroes were excluded from jury service rested on a statutory foundation, 18 Stat. 336 (1875), 8 U.S.C. § 44 (1958), and that it is unnecessary to find "prejudice" against the defendant, "for Congress has forbidden [such exclusions], and a tribunal set up in defiance to its command is an unlawful one whether we think it unfair or not." 332 U.S. at 293. But this statement cannot be taken at face value, since it does not explain why a tribunal that is "unlawful" can properly convict white defendants. In exercising its power of supervision over the administration of justice in the federal courts, it is worth noting, the Supreme Court forbids improper exclusionary practices without regard to

versy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," which was said in *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), to be "the gist of the question of standing." Nor can it be explained as a necessary procedural expedient for insuring that the Negroes excluded from jury service will have a champion, even an unworthy one, of *their* constitutional rights; they have a remedy of their own. See *Cassell* v. *Texas*, 339 U.S. 282, 303 (1950) (dissent). And, if this remedy be thought inadequate (because, by hypothesis, it has not cured the evil), they would be as well served by white as by Negro champions.[22] The distinction, rather, appears to stem from a premise of racial solidarity: that all-white juries will discriminate against Negro defendants, by being either less than fair to them or more than fair to white defendants.[23] To the extent that the Negro defendant is allowed to invoke the due process clause, the premise is that a jury from which Negroes are intentionally excluded will not give him a fair trial;[24] the alternative equal protection founda-

"whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946).

Soon after the *Fay* case, the Court returned to its habit of vouching the fourteenth amendment itself as the authority for its action, Cassell v. Texas, 339 U.S. 282 (1950), which is not unnatural, since the statutory provision is an exercise of the power granted to Congress by § 5 of the amendment.

22. When a defendant in a criminal case alleges that Negroes have been systematically excluded from jury service, is he asserting a *jus tertii*? Yes, if he is White; no, if he is a Negro, according to a recent study, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 658 (1962). But if the defendant in a criminal case is entitled to be tried before a jury representative of the whole vicinage, not just of those subgroups to which he belongs, a white defendant is no more relying on *jus tertii* than a Negro in complaining of the exclusion of Negroes.

Indeed, if the jury system is a device for insuring fairness in the administration of criminal justice, rather than an aspect of self-government (like voting), it is the excluded juror—not the defendant—who is claiming in *jus tertii;* and it might even be thought that *these* actions are unnecessary in view of the lively interest defendants in criminal cases have in objecting to exclusionary practices.

23. In United States v. Harpole, 263 F. 2d 71, 79 (5th Cir. 1959), there is a suggestion that all-white juries are objectionable because they will be too lenient with Negroes who commit crimes against other Negroes, thus denying adequate personal protection to the law-abiding members of a Negro community. Perhaps so, but then Negro defendants would be unlikely to object to the exclusionary practice, at least not if its abandonment might produce enough Negro jurors to affect the composition of the jury before which they would be tried. The theory of the *Harpole* case, therefore, would suggest that white defendants should be allowed to act as champions of the Negroes excluded from jury service.

24. It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not. Cassell v. Texas, 339 U.S. 282, 301-02 (1950) (dissent).

tion for reversing such convictions (which is more commonly encountered in the opinions of the Supreme Court, when one clause is singled out) is that white defendants will be treated more generously by all-white juries than Negroes, so that even though the brand of justice meted out to Negroes would be constitutionally unobjectionable if applied to all, a weaker brand is given to Whites. "The inquiry under [the equal protection] clause involves defendants' standing before the law relative to that of others accused . . . . to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the laws.'" *Fay* v. *New York*, 332 U.S. 261, 285 (1947).

3. Race as a factor in testing constitutional validity of criminal convictions. In reviewing criminal cases in which violations of the due process clause have been alleged (*e.g.*, denial of counsel, involuntary confessions, unreasonable delays in arraignment, etc.), the federal courts have often referred to the defendant's race or color. Without suggesting that race or color were crucial in all of these cases, or indeed in any, I cannot believe that they were merely neutral circumstances, like the defendant's social security number. Race, to the contrary, has been treated as a relevant circumstance, like the defendant's youth, poverty, illiteracy, or friendlessness, in judging whether he received due process of law. Rigorous proof of racial prejudice has not been demanded, however, and it would not be unreasonable to describe these cases as exercises of benevolent vigilance thought necessary to protect Negroes as a class from improper practices by the police and trial courts.

Each of these legal distinctions based on race or color (to which I might add the Japanese curfew and exclusion cases)[25] has its own rationale, which finds in the history, traditions, customs, and attitudes of the community a foundation for the conclusion that race or color is relevant to some public decisions. The distinctions may not be equally justified, and they of course do not lead to the conclusion that race or color is always an appropriate basis for official behavior. But I cannot regard the instances I have cited above as forming a closed circle to which no other racial distinctions can be admitted.

As for the racial zoning, restrictive covenant, and school segregation cases, I have already pointed out that they do not necessarily invalidate social legislation of a remedial character that imputes no inferiority to any racial group, any more than they invalidate legislation that limits the freedom of women or children in the interest of correcting a social or economic evil. Indeed, whereas such legislation restricts women or children while leaving men or adults free, New Harmony's ordinance imposes the same restrictions on both Negroes and Whites, and is, if anything, more clearly even-handed. In short, I find nothing unreasonable in the classification employed by the ordinance to achieve its ends, and for the reasons set out earlier in this opinion these ends seem to me well within the range of permissible legislative action.

I would reverse the judgment below, and dismiss the complaint.

25. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

DANIEL, Circuit Judge (concurring)

For me, the critical fact in this case is that New Harmony will not allow the Negro plaintiff to purchase or occupy a plot of land that may be purchased or occupied freely by any white person.[1] His freedom to live where he wishes is restrained by New Harmony's ordinance just as clearly as it would have been by the Louisville racial zoning ordinance that was annulled as unconstitutional in *Buchanan* v. *Warley,* 245 U.S. 60 (1917)—and, whatever view may be taken *sub specie aeternitatis* of the New Harmony and Louisville experiments in social control, an individual Negro may equally resent the restriction imposed on him whether it feeds New Harmony's program for achieving racial harmony or Louisville's. While I agree with Judge Everett that the question before us was not authoritatively answered by *Buchanan* v. *Warley, supra, Shelley* v. *Kraemer,* 334 U.S. 1 (1947), and *Brown* v. *Board of Education,* 347 U.S. 483 (1954), I cannot accept his conclusion that the ordinance is consistent with the equal protection clause. Thus, I concur in the majority's decision, though I reach it by a different route.

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1. As will be seen, I do not find it necessary to reach the claim that the ordinance restrains "freedom of association" by preventing persons of all races from living where they choose. But I must confess that I do not think this objection is adequately answered by Judge Everett's opinion. Of course, no one has the right to select the persons with whom he will associate in public schools or in government service, nor would I dispute the power of state or federal legislative bodies to deny this right in some other aspects of life. At the same time, it is clear to me that there are limits to legislative power in this area, and that modern civilization's assault on privacy may in time persuade us that a measure of freedom of association, not only in the home but outside it as well, is a prerequisite to the preservation of a free society. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 491-505 (1962); see also Justice Brandeis' dissent in Oldstead v. United States, 277 U.S. 438, 478 (1928) ("the right to be let alone —the most comprehensive of rights and the right most valued by civilized men"). As to the possibility, indeed certainty, that such a freedom of association would be invoked for base as well as noble ends, see Pound's dissent in People v. Gitlow, 234 N.Y. 132, 158, 136 N.E. 317, 327 (1922) (". . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.").

The extent to which legal protection should be accorded to freedom of association is undeniably vague, but in this respect it resembles the right to travel, protected in Kent v. Dulles, 357 U.S. 116 (1958); the right to marry and have children, see Skinner v. Oklahoma, 316 U.S. 535 (1942); the right of parents to control their children's education, see Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923); the right to refuse to affirm a belief, West Virginia State Bd. of Edu. v. Barnette, 319 U.S. 624 (1943); and the right to engage in intellectual inquiry, see Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring). Judicial support for these freedoms seems exotic not because they are beyond the range of constitutional protection, but because, happily, they have rarely been invaded by our legislative bodies. And, just as judicial stewardship of these liberties is not forestalled by the paucity of precedents, so I do not doubt that the freedom to choose one's residence would be protected in a proper case. Even those who reject natural law concepts in determining the scope of the liberties that are listed in the Bill of Rights acknowledge that others, not explicitly mentioned, may be brought within the nation's pledge that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law."

Our inescapable starting point is the Supreme Court's formulation in *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." For me, this warning was in no sense weakened by the Court's refusal in *Hirabayashi* to invalidate a curfew imposed in war-time upon persons of Japanese ancestry when "attack on our shores was threatened by Japan" or by its later refusal in *Korematsu* v. *United States,* 323 U.S. 214 (1944) to invalidate a war-time military order excluding such persons from a military area on the West Coast. Sober, and somber, second thoughts about those ventures in racial distinctions should impel us, rather, to look suspiciously at even the most seductive proposals for racial experiments.[2] I cannot, therefore, accord to New Harmony's ordinance a presumption of innocence: rather, since it denies a Negro, solely because of his race, the right to do something that may be done by a white person, New Harmony must bear the burden of proving that its action is consistent with the equal protection clause.

At one level, the ordinance is defended on the theory that its restrictions inflict no injury because the land and houses affected are not sufficiently differentiated to make any difference to a rational person. The parties are in agreement that the lot in litigation is located in a large area consisting solely of similar plots of land and that the parts of New Harmony that have been built up contain only so-called "tract houses," so that for every house, there are dozens of others substantially the same in construction, equipment, and outward appearance. Because these assertedly undifferentiated building lots and houses have been designated "N" and "W" in equal number, New Harmony argues that its ordinance damages neither Negroes nor Whites. I agree that the ordinance here is different from the zoning law in *Buchanan* v. *Warley,* where the Negroes may have been, and probably were, confined to deteriorated sections of the city, and that it is also different from the private covenant in *Shelley* v. *Kraemer,* where there was not even a pretense of equal housing opportunity. But Anglo-American law has always regarded every plot of land as unique, whether it be an Englishman's castle or an American commuter's split-level home in the suburbs. This may be why the doctrine of "separate but equal" accommodations, as enunciated in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), was not even discussed in the *Buchanan* and *Shelley* cases.

Moreover, New Harmony itself has decided that every plot, whatever its physical characteristics, is unique. The only reason for labelling a building lot or residence "W" or "N" is to set it aside for a special use; having espoused the principle that the color of one's next-door neighbor is important, New Harmony is hardly entitled to argue that the plot which Smith wants but cannot buy is no different from others that he can buy but does not want. The

2. As Justice Jackson said of the *Hirabayashi* case: "I think we should learn something from that experience." Korematsu v. United States, 323 U.S. 214, 246 (1944). See Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L.J. 489 (1945).

traditional concept of the uniqueness of every parcel of land may be outmoded for some purposes, but it cannot be properly rejected in this case, where the litigated plot is viewed as unique by both the plaintiffs and the defendant.

At a more fundamental level, New Harmony asserts that the racial classification employed by the ordinance is justified by the social ends that it serves. We are asked to defer to the legislative judgment unless we can say with assurance either that it is wholly capricious or that it has the purpose or effect of humiliating or stigmatizing persons because of their race or color. I will speak later of the difficulties of determining whether legislation "humiliates" or "stigmatizes"—pausing only long enough to note that the objects of legislation rarely share the outlook and assumptions of its draftsmen—and will direct my attention first to the theory that the field of race relations is an appropriate area for judicial deference to legislative decisions, at least when they do not produce humiliation or stigma.

Let us be clear about what has been proposed by the Town of New Harmony and accepted, if I understand him, by Judge Everett. It is that the due process clause, as applied to the substantive content of legislation, "demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained," *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934), and that the equal protection clause is violated by a classification of persons "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective" but not "if any state of facts reasonably may be conceived to justify it," *McGowan* v. *Maryland,* 366 U.S. 420, 425 (1961). If these are indeed the appropriate criteria, and if they are to be applied to experiments in race relations as indulgently as they are applied to economic regulation, I would agree that New Harmony's ordinance is unexceptionable. Let us see, however, what other legislative experiments in race relations would be permissible if these are the appropriate criteria. "I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples . . . . I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after." *Board of Education* v. *Barnette,* 319 U.S. 624, 660-61 (1943) (Frankfurter, J., dissenting).

1. Other routes to integration. New Harmony's ordinance uses the individual residence or building lot as the unit to build its checkerboard, but in other communities common sense or professional advice may favor variations under which alternate city blocks or wards will be employed. Judge Everett's opinion would seem to uphold or reject racial zoning having the formal characteristics of the ordinance invalidated in *Buchanan* v. *Warley,* depending upon whether we as judges think it will turn out to be a transitional measure, fostering a spirit of tolerance and thus eliminating the conditions that brought it into being, or a self-fulfilling prophecy, preventing the growth of tolerance and thus supplying the need and justification for its own perpetuation.

Still other communities may decide, again in the interest of achieving and preserving an integrated pattern of housing, to depart from New Harmony's 50-50 ratio of Negro and white accommodations in favor of a ratio corresponding to the local, state, or federal ratio of Negro and white families; or a ratio thought most likely to attract or to hold Whites; or a ratio thought to produce the ideal "mix" for fostering good "interpersonal relationships." Indeed, it is reported that some public housing projects are already experimenting with "benign" quotas on Negro occupancy, under which apartments are denied to qualified Negroes and rented to Whites, whose priority would be lower except for their race, in order to achieve integrated occupancy, thus substituting "balanced occupancy" for their earlier goal of "open occupancy."[3]

Restrictions on the acquisition and occupancy of residences in selected communities are obviously not the only mode of achieving integrated housing and, given our nation-wide mobility, they may turn out to be ineffective. If we tolerate such restrictions on the theory that they are reasonable modes of achieving a benevolent end, however, I can see no basis for caviling at public subsidies, such as bonuses to landlords whose apartments enjoy a mixed occupancy, grants to Negroes to enable them to rent apartments or purchase homes in residential areas that would otherwise be beyond their means,[4] or payments to induce white families to move to or stay in integrated neighborhoods.

Although New Harmony's social experiment focuses on housing as the most promising arena for improving racial harmony, other communities may prefer to start elsewhere—with the public school system, for example. If the state or local legislative body may impose "benign" quotas on public housing projects or racial restrictions on the ownership and occupancy of private homes, why may it not also permit Negroes (but not Whites) to transfer out of public schools with a high concentration of Negro children,[5] limit the percentage of Negroes in any one school by requiring "excess" Negroes to go to other schools, rezone school districts to form areas that are racially "balanced" but geographically and otherwise irrational,[6] permit only Negroes of superior

3. See Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30 (1960); Note, *Racial Discrimination in Housing*, 107 U. Pa. L. Rev. 515, 538-50 (1959); Comment, 59 Mich. L. Rev. 1054 (1961); Van Alstyne & Karst, *State Action*, 14 Stan. L. Rev. 3, 44 (1961).

4. The New York Times reported that "economic barriers appear to be replacing social discrimination as the most formidable obstacle to racial integration [in New York City]." *Id.*, Oct. 22, 1961, § 8 (Real Estate), p. 2R, col. 8.

5. Under New York City's Open Enrollment Plan, pupils are allowed to transfer from so-called "sending" schools (those whose student population is either 90% Negro and/or Puerto Rican or 90% "other") to so-called "receiving" schools (75% or more "other" if facilities are underutilized by 10% or more). New York City Bd. of Education, The Open Enrollment Program, Progress Report 3 (1961). If white as well as Negro pupils exercised their option to transfer out of a Negro-dominated school, the plan could result in an increase in the percentage of Negroes left behind. For this reason, the New Harmony approach to integration suggests a variation on the New York plan, under which only Negroes would be allowed to leave a predominantly Negro sending school.

6. See Clemons v. Board of Education, 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350

ability to transfer to "white" schools lest intimacy with below-average Negroes confirm the stereotype of inferiority, or otherwise treat school children differently, because of their race, in the interest of a higher good?[7] Similarly, since Negroes are "under-represented" in colleges and universities, may the state seek to redress the balance by requiring a certain number of places to be set aside for them, forbidding the admission of Whites (or of such white racial or religious groups as are "over" represented) until the balance has been redressed,[8] granting racially restricted scholarships, or requiring a differential in tuition charges?

It is notorious that the number of Negroes in administrative and professional posts is far below the percentage of Negroes in the working force. No doubt many students of race relations, if put to a choice, would prefer to start with employment rather than with housing in an effort to "normalize" Negro life. If New Harmony may reserve every other building plot for Negro occupancy, may not Negroes be given compensatory credit on civil service examinations (as was done for veterans)? If this is permissible, may the state take the more direct route of restricting the tenure of public jobs so as to prevent Negroes from holding more than their "share" of menial, or less than their "share" of executive, positions?[9] Indeed, may not the same rule of propor-

U.S. 1006 (1956). *Cf.* the "uncouth twenty-eight-sided figure" that was found offensive, as a municipal boundary, in Gomillion v. Lightfoot, 364 U.S. 339 (1960).

7. I am referring, of course, to plans for "integration" whose treatment of individuals "is based wholly upon color; simply that and nothing more" (Buchanan v. Warley, 245 U.S. 60, 73 (1917)), resembling in this respect the system of school segregation condemned in *Brown v. Board of Education.* I do not mean to intimate any doubt about the assignment of remedial or other special teachers to schools with a below-average educational achievement, or the abandonment of the "neighborhood school" principle in favor of city-wide schools, or the location of new schools in areas of racially mixed rather than concentrated occupancy, where individuals are not singled out for special treatment because of their race. A community that builds one city-wide high school, for example, obviously produces a racial mixture in the student body that would not occur if several neighborhood schools were constructed, but whether it does one or the other, it will not have to distinguish between one pupil and his neighbor on the basis of race and it will produce a host of nonracial educational results. It may be, of course, that one or more of the many persons, private and official, who have a voice in or an influence on such a decision will value its racial consequences more highly than its other consequences, but I do not regard such possibilities as susceptible to judicial inquiry.

8. The President's Commission on Higher Education, in its report *Higher Education for American Democracy* (1947), reported that Negroes represented about 10% of the total population of the United States, but accounted for only 3.1% of the enrollment in institutions of higher education. Although disclaiming any endorsement of racial quotas, the Commission also noted that Jewish medical school students declined from 16.1% (1935) to 13.3% (1946) of the total enrollment. It is not clear whether the Commission would have thought this decline required "particular consideration" if there had been a corresponding increase in the percentage of Negroes enrolled in medical schools. Yet it is obvious that if the percentage of medical students of Negro descent increases, the percentage of whites—whether Jewish, Catholic, or Protestant—must decline.

9. This would call for a revival of the theory of Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941) (housing authority may allocate public housing in proportion to the "need" of each race), which I had thought was discredited by *Brown v. Board of Education.*

tionate representation be imposed by federal, state, or local legislation on private businesses and the professions?

Although the theory is now in desuetude, respectable authority once argued that if Negroes devoted their talents to "self-improvement" in modest endeavors, prejudice would wither away as their achievements came to command the respect and admiration of their fellow citizens. If experiments in race relations are to become the order of the day, some Negro leaders and state or local legislatures may conclude that the creation of model "Negro communities" would be the best route to ultimate integration. If so, may municipal boundaries be redefined to produce such a community, despite *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), on the theory that the Negroes thus isolated have been given political control of the inner, rather than denied political participation in the outer, community? If benevolence in its conception confers legitimacy on such gerrymandering, can it later lose its birthright if, for example, the Negro insiders should come to prefer a union with the white outsiders to form a single larger community?[10]

With the elimination of official segregation in the public school system in some parts of the country still a long way off, some will no doubt think that proposals to go beyond this minimum public goal are only speculative exercises. But our country is riding two trains, and one is moving rapidly;[11] before long, it may generate as much litigation as the slow train through Dixie. Witness, on this question, Fortune magazine:

> The city, in short, must exercise "positive discrimination" in favor of the Negro if it is to enable the mass of Negroes to compete with whites on equal terms. The U.S. must learn to look upon the Negro community as if it were an underdeveloped country. (March 1962, p. 151).

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10. Except for the Sunday Closing Law cases, the courts have not often been called upon to decide whether a statute serves a purpose different from its purposes at enactment; and in those cases, the legislatures had provided a running commentary on the statutes in question in the form of frequent amendments. McGowan v. Maryland, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); see also Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (effect of changed circumstances on constitutionality of legislation).

11. A few straws in the wind, in addition to those already mentioned:

> A quota system to insure racial integration at summer camps for youngsters was advocated here today by Dr. David Barry, executive director of the New York City Mission Society . . . . Dr. Barry said that camps should have an ethnic balance as part of the function of democracy.

N.Y. Times, Nov. 9, 1958, p. 73, col. 4.

> Jerry R. Holleman, Assistant Secretary of Labor and executive vice chairman of the President's Committee on Equal Employment Opportunity, disclosed . . . that stress was being put on efforts to have labor unions adopt its Plans for Progress . . . .
>
> In achieving equal employment opportunity, he declared, it may sometimes seem that the Negro worker is favored for a job over a white man.
>
> "I am fully aware that some seeming inequities may result from efforts to undo the inequities of the past," he added. "You cannot bring into balance a Negro un-

See also Grodzins, *The Metropolitan Area As a Racial Problem* (1958), in which a leading political scientist recommends "experimentation with various systems of controlled migration" to control the movement of Negroes into particular urban and suburban areas ("fostering a smaller discrimination in favor of scotching a larger one"), "experiments with all-Negro suburban communities," encouragement of Negro migration to small cities because they "are greatly underrepresented in virtually all places outside the South and the larger urban areas of the rest of the country," and measures to attract white residents back to large metropolitan areas.[12]

2. *Other minorities.* Although Negro-white relations are in the forefront of much thinking about American society today, we have other minorities whose residential, occupational, and educational patterns may be thought abnormal. In condemning "de facto segregation" in the public school system (and, by inference, in housing and other aspects of life), public officials and even scholars often fail to make clear whether they are referring only to Negroes, or to any minority that may be distinguished by race, color, religion, national origin, language used in the home, economic status, cultural tradition, or other characteristics.[13] In one sense, we are all members of minority groups.

> employment rate double that of whites without a stepped-up rate of hiring Negroes. You cannot give a Negro a long-overdue promotion without denying some other persons that same promotion.
>
> "To us these truisms are basic to the quarantee of equal employment opportunity. And yet, we must realize there are those who would like to keep the status-quo or even reverse it."

N.Y. Times, Oct. 30, 1961, p. 15, col. 4.

> An auxiliary probation system for Negro criminals, under which church committees will work with the city probation unit, was announced this week by Judge Raymond Pace Alexander, a former member of the city council . . . . The plan already has been approved by two large church groups, the African Methodist Episcopal and the Baptist churches. Other major church groups with Negro members are expected to join the program.

N.Y. Times, Jan. 18, 1959, p. 53, col. 1.

12. While some of Professor Grodzins' recommendations contemplate private exhortation and action rather than official racial restrictions, it is almost inevitable that many persons will be unwilling to rely on private efforts and will seek to implement recommendations of this type with state and local laws and regulations. Grodzins himself suggests at least some official action to create interracial suburban communities:

> It is commonplace for federal legislation to establish conditions that must be met by local governments before they qualify for financial aid. The question arises: is it possible to write a federal law that would supply aid for community facilities on a priority basis to those suburbs containing a given minimum of Negro residents? . . . Clearly no requirement based directly upon a racial classification would meet constitutional standards. Yet it is not beyond the realm of legal creativity to find another scheme of definition that would foster the end of racial distribution and yet remain within constitutional limits.

GRODZINS, THE METROPOLITAN AREA AS A RACIAL PROBLEM 24 (1958).

13. Thus, New York City's "Open Enrollment Plan," *supra* note 5, classifies schools according to their percentages of Negro, Puerto Rican, and "other" students; see also NEW YORK CITY BD. OF EDUCATION, TOWARD GREATER OPPORTUNITY 155 (1960). By this

Even if the term "minority" is confined to groups that are small in relation to our national population and that are subjected to pressures or prejudices that have a noticeable effect on their geographical distribution, persons of Chinese, Mexican, Italian, Puerto Rican, Jewish, and many other ancestries would qualify.[14] If we are to bow to the legislative judgment that racial quotas, restrictions, subsidies, and other carrots and sticks are desirable ways to correct the social and economic conditions of Negro life, I see no basis for applying a different principle in reviewing legislative experiments with these other groups.

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taxonomy, a school with a 100% Jewish or Italian population is not a "minority" group school. But in generalizing on the value of a mixed student body, the New York Board of Education does not restrict its comments to schools with a predominantly Negro or Puerto Rican population:

> By its very nature, as well as by its demonstrated effects, the concentration of racial minorities in the classroom and in the schoolyard inflicts psychological wounds on the segregated group. But it also, more or less inevitably, tends to provide it with an education that is substantively less adequate than that enjoyed by the majority group, even though the latter, too, may suffer socially and psychologically through its isolation from the minority.
>
> Whether school segregation is the effect of law and custom as in the South, or has its roots in residential segregation, as in New York City, its defects are inherent and incurable. In education there can be no such thing as "separate but equal." Educationally, as well as morally and socially, the only remedy for the segregated school is its desegregation.

COMMISSION ON INTEGRATION, NEW YORK CITY BOARD OF EDUCATION, TOWARD THE INTEGRATION OF OUR SCHOOLS 6 (1958).

For a more explicit argument in support of integrating all groups, not just Negroes, see the following:

> Just as we make it possible for youngsters to have hot lunches or to supplement their educational diet with those things that help to make them healthy and well-rounded, so it is that we have to aggressively structure the composition of a school so that they learn with girls, boys, higher, upper, middle-income youngsters, Negroes, whites, Jews, Catholics and anything else that we have in the population.

Dr. Jeanne L. Noble (speaking for Dr. Dan Dodson), Fourth Annual Education Conference, U.S. Comm. on Civil Rts., May 4, 1962, transcript p. 383.

14. Although the New York City Board of Education's statement of principle (quoted note 13 *supra*) speaks of "racial minorities," Puerto Ricans (who are embraced by the Open Enrollment Plan) are racially very divergent. See Gordon, *Race Patterns and Prejudice in Puerto Rico*, 14 AM. SOC. REV. 294 (1949); Gordon, *Cultural Aspects of Puerto Rico's Race Problem*, 15 AM. SOC. REV. 382 (1950); Siegel, *Race Attitudes in Puerto Rico*, 14 PHYLON 163 (1953). What homogeneity they possess by reason of national origin, culture, economic status, use of a foreign language, recent arrival on the mainland, etc., does not seem markedly different from the common characteristics of many other groups in our nation. See Hernandez v. Texas, 347 U.S. 475, 478 (1954):

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.

3. Other legislative ends. New Harmony argues that its ordinance is an appropriate means of achieving its objective of integrated housing, which, in turn, is expected to increase white understanding and acceptance of Negroes as individuals and thus to diminish the public and private barriers to Negro advancement in education, public life, employment, and other areas of public concern. But integration is not the only way that these ends may be served, nor are these the only ends of civil society. If the development and preservation of group traditions and customs may be regarded as proper objectives of legislative action, the courts may be asked to apply the "hands-off" principle for which New Harmony contends here to legislative measures of a very different type. Let it not be forgotten that Negroes as conservative as Booker T. Washington and as radical as W. E. B. DuBois both perceived certain advantages in segregated public education.[15] While they may have merely sought to make a virtue of necessity, other leaders of racial, religious, and national groups—conscious of the corrosive effects of modern American life on minority traditions and customs—may well invoke our commitment to cultural pluralism in asking federal, state, and local legislatures to preserve the character of local neighborhoods, schools, recreational facilities, and other institutions by keeping outsiders out and insiders in.

4. Other foundations for legislative judgments. I have confined myself so far to social experiments in race relations that might be undertaken on the advice of sociologists, social psychologists, psychiatrists, and other professional students of our public life. While these groups may be generally agreed, at a high level of abstraction, on the direction in which public policy on race relations should lead us, they obviously entertain a welter of conflicting views about specific remedies. Moreover, if our approach to economic regulation is the touchstone of constitutionality, legislation can be "reasonable" and therefore beyond judicial control, whether there is a consensus of professional opinion to support it or not. The famous "Brandeis Brief" contained a mass of opinions about the medical, economic, social, and moral dangers of long hours of employment, and the converse merits of short hours, but it was not as-

15. In 1935, on the premise that prejudice against Negro school children "is not going materially to change in our time," DuBois argued that "[w]e shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired" and criticized the use of children "as a battering ram." DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 331 (1935). After adducing these "negative arguments for separate Negro institutions of learning based on the fact that in the majority of cases Negroes are not welcomed in public schools and universities . . . ," he added that "there are certain positive reasons [for separate institutions] due to the fact that American Negroes have, because of their history, group experiences and memories, a distinct entity, whose spirit and reactions demand a certain type of education for its development." *Id.* at 333.

The doctrine of "separate but equal" facilities itself stems from a lawsuit concerning a school for Negro children that had originally been a private school for Negroes who wished to shield their children from the prejudice they encountered in the Boston public school system. Roberts v. City of Boston, 59 Mass. 198 (1849). See Levy & Phillips, *The Roberts Case: Source of the "Separate But Equal" Doctrine*, 56 AM. HIST. REV. 510 (1951).

serted that these opinions were universally accepted by experts, or even that they were correct. The material was adduced, rather, to establish only that the legislators had some "ground on which they could, as reasonable men, deem this legislation appropriate to abolish or mitigate the evils believed to exist or apprehended."[16] By this lenient test of constitutionality, legislation based

16. THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF MR. JUSTICE BRANDEIS 66 (Fraenkel ed. 1934), identified as Brandeis' oral argument in Stettler v. O'Hara, 243 U.S. 629 (1917) (presumably when first argued in 1914) by FREUND, ON UNDERSTANDING THE SUPREME COURT 126 (1949).

The Brandeis brief itself was made up largely of opinions expressed by physicians, social workers, factory inspectors, and legislators, much of the material being so general, ambiguous, or vague as to resist efforts to establish its truth or falsity.

The standards of relevance and competence applied in compiling the material did not exclude a multiplicity of statements like these:

> It is the idea of the German Emperor [1890] that the industrial question demands the attention of all the civilized nations . . . .
>
> The quest of a solution becomes not only a humanitarian duty, but it is exacted also by governmental wisdom, which should at once look out for the well-being of all its citizens and the preservation of the inestimable benefits of civilization.

Brief for Appellee, p. 48, Muller v. Oregon, 208 U.S. 412 (1908).

> Bleachers in a petition to their employers, 1853: We believe the result generally is such as to corroborate our statement that short hours produce more work and that of a better quality than under the old system.

Id. at 65.

> During the agitation for the ten-hours bill in the year 1844 or 1845, he (a cotton-spinner at Preston [England]) reduced his time voluntarily to eleven hours instead of twelve, and at the end of twelve months he reported, as Mr. Hugh Mason did, that he had got a better quality of work and more of it in the eleven hours than he had in the twelve, and that is obvious to anybody who understands the process of following a machine.

Id. at 67.

> In a cigar-box and wrapper-mold factory [in Kassel, Germany] all adult workers were given uniform working hours in summer and winter—a nine-hour day, from seven to six, with two hours free time at noon. The owner asserts that in this shorter time no less work is done than formerly in the longer time, the eleven-hour day.

Id. at 69.

> B. used to work [in a British printing plant] from 8 A.M. to 8 P.M. regularly, including Saturdays . . . . She disliked overtime, was tired out at the end of a day's work, and thought the other women were too, and she had often noticed how badly the work was done after eight or nine hours of it. Later on, as a forewoman, she noticed that the girls after overtime always loafed about the next day and did not work well.
>
> The comparative immunity from accidents in the laundries in the West Riding of Yorkshire may be possibly due in some measure to the moderate hours of employment.

Id. at 109.

> If the matter could be gone into carefully, I think the committee [Select Parliamentary Committee on Shops Early Closing Bill] would be perfectly surprised to find what a large number of these women are rendered sterile in consequence of these prolonged hours . . . . I know of one case where four members of a family who

wholly on old wives' tales might be rejected,[17] but almost anything else would pass muster.

The Town of New Harmony itself does not want this test of constitutionality to be applied in full strength to legislative judgments in the field of race relations, but proposes that it be diluted by the "humiliation" or "stigma" exception. Social experimentation would be halted, under this test, if the effect of the legislation was to humiliate or stigmatize its objects. The segregation of school children by race or color is regarded as an illustration of such legislation, and *Brown v. Board of Education* as an example of the appropriate judicial response. Of course, I concur in this characterization of racial segregation in the public school system in our day and age, and agree that its humiliating effects are manifest even if not necessarily intended by all of its proponents. And I would also agree that racial segregation in public parks, buses, and golf courses are merely other facets of the same system, which can hardly be viewed independently, even though they might deserve or require separate examination under other circumstances.[18]

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were shop-girls were sterile, and two other girls in the family, not shop-girls, have borne children.

Id. at 37.

Wherever you go . . . near the abodes of people who are overworked, you will always find the sign of the rum-shop.

Id. at 45.

Progressive physical deterioration produced by family labor in factories. It is well known that like begets like, and if the parents are feeble in constitution, the children must also inevitably be feeble.

Id. at 51.

A reduction in hours has never lessened the working-peoples' ability to compete in the markets of the world.

Id. at 65.

What is the greatest desire of the factory operatives? We reply, beyond all question, one of the greatest desires of the factory operatives of America, relative to employment, is for ten hours.

Id. at 101.

The report for the district of Chemnitz [Germany, 1888] says that the manufacturers of that district have repeatedly expressed a desire for the introduction of the ten-hour day.

Id. at 103.

17. Unless the legislative body's action *ipso facto* establishes the rationality of the legislation, so that whatever is, is reasonable.

18. Such legislation might, of course, miss its mark if the segregated group refused to acquiesce in the majority's depreciation of them and instead viewed the legislation as proof of the majority's insecurity, ignorance, or barbarism. See Plessy v. Ferguson, 163 U.S. 537, 551 (1896), to the effect that if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Whatever naivete, insensitivity, or disingenuousness this may have displayed as a conclusion from the facts there before the Court, it cannot be denied that a minority group may sometimes successfully reject an attempt to humiliate it.

It is worth recording, for its bearing on the defendant Town's claim that we must dis-

But even the most well-intended legislation may be felt as humiliating by its objects, and especially so in a country that professes that "all men are created equal." When a Negro is told that he may not purchase property labelled "W," the rebuff is not necessarily softened for him, however others may feel about it, by the fact that other property is reserved for him or that Whites are subject to parallel restrictions as to "N" property. I do not challenge the sincerity, or even the truth, of New Harmony's assertion that integrated housing will confer benefits on Whites as well as on Negroes in expressing doubt that the asserted benefits to Whites would have independently prompted the enactment of the ordinance and in suggesting that many persons will feel that it must stand or fall on the theory that its limitations on the would-be Negro purchaser are imposed "for his own good."[19]

Viewed in this light, the ordinance carries with it the offensive implication that is the unfortunate but seemingly inevitable concomitant of official charity or paternalism.[20] Beyond that, it rests on, or is tantamount to, an official find-

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tinguish between good and bad racial distinctions, that the majority in Plessy v. Ferguson, *supra*, itself accepted this theory; and, indeed, applied it: while sustaining segregation in public transportation, the majority reserved judgment on the suggestion that by the same token Negroes and Whites might be required to walk on different sides of the street or to paint their houses different colors, saying that the police power "extend[s] only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." Plessy v. Ferguson, *supra* at 550.

19. A resolution of the General Assembly of the United Nations speaks of "a fundamental distinction between discriminatory laws and practices [concerning race], on the one hand, and protective measures designed to safeguard the rights of the indigenous inhabitants, on the other hand." General Assembly Resolution 644 (VII) (Dec. 10, 1952), in U.N. GEN. ASS. OFF. REC., 7th Sess., Annexes, Agenda Item No. 33, at 10-11, 14 (A/2296) (1952). But the Resolution goes on to recommend that such measures "should frequently be examined in order to ascertain whether their protective aspect is still predominant, and whether provision should be made for exemption from them in particular circumstances." *Ibid.* The Resolution is concerned only with laws affecting territories that are not self-governing; whatever application it might have by analogy to the American Indians, as an indigenous population, the Constitution surely does not permit Congress and the states to enact general "protective" legislation for Negroes or any other racial group of citizens.

20. A recent report of a committee of the New York City school system aptly illustrates this point: Teachers and principals are advised to avoid the use of the terms "low-income or underprivileged children" and "culturally-deprived children" because they have come to have a pejorative connotation, and to substitute "children unable to secure much beyond the necessities of today's world because of the modest finances of their family" and "children whose experiences, generally speaking, have been limited to their immediate environment." COMMITTEE TO STUDY OBJECTIONABLE TERMS, NEW YORK SCHOOL BOARD, REPORT 15 (1961). If the useful life of a euphemism is short, it may be that the phrase is not intrinsically offensive, but that the persons to whom it is addressed have an unchanging attitude toward the idea it expresses.

In deciding the disputed issue of an Indian's federal income tax liability for profits realized on a sale of timber cut on allotted land, the Supreme Court construed the Internal Revenue Code consistently with a federal "purpose of bringing [Indians] finally to a state of competency and independence" so that they can "go forward when declared competent with the necessary chance of economic survival in competition with others." Squire v.

ing that Whites will not live side-by-side with Negroes except under legal compulsion. Perhaps this will be regarded by some as an official condemnation of the attitude of Whites, in no sense reflecting adversely on Negroes; but just as many Negroes could not write off racial segregation in the public schools as merely a monument to white inhumanity, so I doubt if the implications of the New Harmony's ordinance will leave them unscathed. Rather, many Negroes may ask themselves, as victims of private prejudice often do, what they have done to instill such distaste in others; and this inward search—made more acute by the fact that similar legal measures are not deemed necessary for other minority groups—may be equally destructive of self-esteem whether the finding that integrated housing cannot be achieved without legal compulsion is correct or not. Moreover, the very fact that the finding is a considered judgment from a friendly and official source, rather than an irresponsible or transitory gesture of private hostility, may well enlarge the contribution it makes to self-doubt.

No one has alluded to another inescapable problem created by New Harmony's well-intended ordinance: although it does not define "White" or "Negro," it cannot be administered without rules and procedures for distinguishing white persons from Negroes. Since the town clerk is forbidden by the ordinance to record a deed, lease, or other conveyance unless the purchaser or tenant is qualified to acquire or occupy the property, he will ordinarily be the first governmental official to inquire into a purchaser's or tenant's race. New Harmony asserts that the proper racial classification will rarely be in dispute; and that in such peripheral cases as may arise, the town clerk will be required to receive evidence and decide the issue in accordance with the rules of procedural due process applicable to any other administrative decision. As to the courts, New Harmony argues that they will not be called upon to review the correctness of any such determination by the town clerk, since an erroneous classification of an individual, though it may *pro tanto* impair the success of the master plan, will not diminish the number or quality of the houses and building lots which he may acquire or occupy. The town clerk's determination can have no other legal consequences, it is argued, either because the individual's race will be irrelevant by virtue of the equal protection clause (as in the case of public employment or education) or because, if it should become relevant to some official action, it will be open to re-examination at that time in the light of the criteria that make it relevant.

The argument is ingenious, but unsound. We cannot shut our eyes to the radiating influence of a misclassification in the social and other aspects of private life (recognized by the law in libel actions based on false statements about one's race); indeed, the ordinance itself derives both its impetus and its appeal from a candid appraisal of the effects of race on a person's social,

Capoeman, 351 U.S. 1, 10 (1956). But for some Indians (including possibly the taxpayer, who was considered competent enough to serve in the armed forces in wartime), even the ostensibly pure advantage of tax exemption may have a bitter aftertaste since it is prescribed as "remedial" legislation for persons who are "incompetent."

economic, psychological, and political life, and thus refutes the wishful claim that a misclassification can do no one any harm. For this reason, as well as because the ordinance may be enforced by legal actions brought by the town's corporation counsel without a prior determination by the town clerk of the defendant's race, I conclude that the courts will necessarily be drawn into the business of determining the race of persons wishing to acquire or occupy property in New Harmony.

In discharging this responsibility, the courts will not get much aid from either the natural or the social scientists. Biologists and physical anthropologists are prepared to define race in wholesale categories by physical traits, but they are not trained for the retail business of classifying individuals. It is unlikely that the species *homo sapiens* was ever divided into "pure" races; but if it was, the fact that members of the species are both cross-fertile and migratory unquestionably means that virtually all of us would prove to be of mixed blood if the geneticists were to discover an infallible means of tracing the racial inheritance of individuals.[21] If we turn from biology to cultural anthropology, ethnology, or sociology for help, we find race defined in cultural terms; but these definitions, like those of the biologist, will be of little assistance to the courts, which must classify individuals, not amorphous groups.[22]

We are, of course, not without statutory and judicial guides in this area. States with segregated public school systems have had long experience in deciding who is "White" and who "Negro," and antimiscegenation laws provide us with ample and exquisite, though often conflicting, categories.[23] We could even take our principles of taxonomy from Hitler's Germany or today's South Africa,[24] on the theory that its principles are being turned to a good use by New Harmony. Whether we use domestic or imported standards, and

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21. DOBZHANSKY, MANKIND EVOLVING 183-91, 253-86 (1962); STERN, PRINCIPLES OF HUMAN GENETICS 680 (2d ed. 1960); MYRDAL, AN AMERICAN DILEMMA Ch. 5 (1944); SIMPSON & YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 37-68 (1958 rev. ed.).

22. MYRDAL, AN AMERICAN DILEMMA 136 (1944). "[T]he concept of the American Negro is a social concept and not a biological one."

23. *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958); MANGUM, THE LEGAL STATUS OF THE NEGRO 1-17 (1940); MURRAY, STATES' LAWS ON RACE AND COLOR (1950 and 1955 Supp.) (see "Negro, definition of" under state name in Index.).

See Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947), in which proof of the defendant's race, in a suit (prior to *Shelley v. Kraemer*) to enforce a restrictive covenant excluding "any person or persons except those of the Caucasian race," consisted of the following testimony by the plaintiff:

> I have seen Mr. McGhee, and he appears to have colored features. They are more darker (sic) than mine. I haven't got (sic) near enough to the man to recognize his eyes. I have seen Mrs. McGhee, and she appears to be the Mullato type.

316 Mich. at 620, 25 N.W.2d at 641.

24. See Landis, *South African Apartheid Legislation, I: Fundamental Structure*, 71 YALE L.J. 1, 4-16 (1961).

whether we rely on geneological records, physical traits, or reputation, however, the determination of an individual's race in a disputed case is dirty business, and I would keep all branches of government out of it whenever possible.[25]

I am not moved to retreat from this position by the instances cited by Judge Everett of racial distinctions now tolerated by the law. As to the Japanese exclusion cases, *Hirabayashi* and *Korematsu*, the Supreme Court's warning that such distinctions "are by their very nature odious to a free people" is at least as important as the judgments themselves, and is more pertinent to the issue before us. The intricate network of laws governing the status of Indian tribes and their members, growing out of a collision between two civilizations and resting on a unique mixture of old treaties, military engagements, a concept of the white man's burden, and guilty consciences, carries for me no implications whatsoever for other groups in our society, except to warn us that the role of the Great White Father may be bitterly resented by those in his tutelage and that a guardian ordinarily prefers to postpone rather than to advance the day when his wards must face the rigors of freedom. I agree that the Supreme Court, in permitting Negroes to attack the systematic exclusion of other Negroes from state juries, seems to have accepted a vague notion of racial solidarity between the Negro defendant and the excluded Negroes, but these cases may also rest on the unstated theory that a community which systematically excludes Negroes from jury service may by the same token lean toward unfairness—on the whole and without regard to individual cases—in its treatment of Negro defendants in criminal cases. Moreover, the hints of racial solidarity in these cases are countered by the Supreme Court's rejection on other occasions of proportional representation as a basis

25. Of course, in extirpating official acts of discrimination, it may be necessary to make a factual inquiry into a person's race: *e.g.*, if systematic exclusion of Negroes from jury service is alleged, the complaint cannot be disposed of without a determination of the facts, including the race of persons admitted to and excluded from jury duty. See also Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962), holding that a state university's requirement that a candidate for admission furnish certificates from alumni (all of whom were, by reason of official segregation in the past, White) was unconstitutional as applied to Negro applicants.

I would also exclude those areas in which the official determination is evoked by some private behavior (*e.g.*, a bequest to aid Negro education) and is not forbidden by the rule in *Shelley v. Kraemer*; in these instances, the racial classification may be tolerated as we tolerate religious classifications for identical or comparable purposes. See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960). In determining when *Shelley* forbids and when it permits judicial enforcement of discriminatory conduct, however, I can conceive of a distinction between private conduct that can be made effective with only occasional judicial intervention (*e.g.*, a bequest to A provided he marries a person of the same race; a gift to charity on condition it be used primarily for Negroes) and conduct that may require constant judicial oversight or frequent decisions on disputed racial classifications in borderline cases (*e.g.*, a charity to aid exclusively persons of more than 80% Negro blood, the corpus to revert if any benefits are given to an unqualified person).

for state jury service,[26] as well as by the fact that the mere absence of Negroes from juries, other than as a result of deliberate and systematic exclusion, does not violate a Negro defendant's rights under the equal protection or due process clauses. If the foundation of such cases as *Strauder* v. *West Virginia* were that juries manned by members of one race cannot dispense even-handed justice to members of the other race, a plan for proportional racial representation would seem not merely tolerable, but essential. Finally, one cannot possibly build a jurisprudence of race relations on the Supreme Court's unsystematic references to the race or color of persons convicted of crime in cases assessing the due process implications of a delay in arraignment, an allegedly involuntary confession, or the lack of counsel. Judge Everett finds in these references a rule of "benevolent vigilance" over Negroes accused of crime; even if this much can be extracted from the cases, which I doubt, it surely does not lead to the conclusion that legislatures may exercise in other areas of life whatever benevolent supervision they may believe is required by the social problems they perceive.

In concluding, I cannot forbear to suggest that this is another area in which Mr. Justice Harlan's dissent in *Plessy* v. *Ferguson* will be vindicated:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. [163 U.S. at 554.] There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. [163 U.S. at 559.]

I cherish the faith that this uncompromising insistence on equality will do more to turn hope into reality than the flexible philosophy of the New Harmony ordinance, resourceful and appealing as it may seem; but whether this be so or not, Justice Harlan's words are for me the authentic voice of the fourteenth amendment.

I concur, therefore, in the court's affirmance of the judgment below.

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26. Virginia v. Rives, 100 U.S. 313, 322-42 (1879); Akins v. Texas, 325 U.S. 398 (1945).